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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

JAVIER M. VILATO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW, WHICH AFFIRMED THE LAW ENFORCEMENT STOP AND SEIZURE OF PETITIONER AS HE WAS BOARDING A DEPARTING TRAIN, IS CONTRARY TO JUDICIAL PRECEDENT AND IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE RULE OF LAW ANNOUNCED IN UNITED STATES v. PLACE, 462 U.S. _____, 103 S.CT. 2637 (1983); FLORIDA v. ROYER, 460 U.S. ____, 103 S.CT. 1319 (1983); AND UNITED STATES v. MENDENHALL, 446 U.S. 544, 100 S.CT. 1870 (1980)?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States.

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JAVIER M. VILATO,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, JAVIER M. VILATO, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in Case No. 83-5622 on May 22, 1984, which affirmed the judgment of the United States District Court for the Southern District of

Florida. United States v. Vilato, 734 F.2d 1480 (11th Cir. 1984).

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit announced its opinion affirming Petitioner's convictions on charges of possession of a firearm not identified by a serial number, in violation of 26 U.S.C. §§5861(i) and 5871, and possession of an unregistered firearm, in violation of 26 U.S.C. §§5861(d) and 5871, in United States v. Vilato, 734 F.2d 1480 (11th Cir. 1984). That opinion is reproduced in the Appendix. The District Court's oral ruling denying the motion to suppress evidence is also reproduced in the Appendix.

JURISDICTION

Petiioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The grand jury for the Southern District of Florida returned an indictment charging JAVIER M. VILATO with possession of a firearm not identified by a serial number, in violation of 26 U.S.C. §§5861(i) and 5871, and possession of an unregistered firearm, in violation of 26 U.S.C. §§5861(d) and 5871. Petitioner filed a pretrial motion to suppress physical evidence.

At a joint motion to suppress hearing/non-jury trial, the District Court denied the motion to suppress and found Petitioner guilty as charged. Petitioner thereafter received a sentence of eight years imprisonment as to Count 1, followed by a period of probation for ten years as to Count 2.

On appeal, Petitioner raised the single issue of the propriety of the trial court's ruling denying the motion to suppress evidence, contending that he was illegally stopped and seized by law enforcement officers as he was boarding a departing train, without probable cause or reasonable suspicion. The firearm discovered in his luggage was the direct fruit of that initial illegality. The Eleventh Circuit rejected this issue, holding that at the time of the initial law enforcement approach, Petitioner was not seized as he was free

to leave at all times. Following that initial approach, as the police obtained reasonable suspicion to warrant a seizure, Petitioner freely and voluntarily consented to a search of his property. Consequently, the seizure of the property was not illegal.

The testimony at the suppression hearing/non-jury trial indicated that at 7:40 a.m. on November 17, 1982, plainclothes detectives John Facchiano and Charles Thompson of the Metro-Dade Police Department, both experienced narcotics officers, arrived at the Miami Amtrak station with the express purpose of identifying narcotics carriers, who the officers knew often transported drugs through the station. Upon arriving at the station, the officers noticed the Petitioner (VILATO) and a companion, identified later as "Lamar", standing outside the station talking to one

another. For nearly one hour, the detectives observed the two individuals as they waited for their train to depart. The pair attracted the detectives' attention because they were looking around and over each other's shoulders. The subjects appeared to be paying particular attention to two unattended tote bags that sat on chairs in the station's waiting area. The detectives watched VILATO and Lamar as they walked about the station, always remaining in a position to see the two tote bags. Facchiano testified that the subjects appeared "ill at ease" and that they were not behaving like normal travelers. Detective Thompson believed that the mannerisms and appearance of the two fit the "drug courier profile."

When the boarding announcement was made for the "Silver Meteor", a Miami to Philadelphia train scheduled to

depart at 9:00, VILATO and Lamar entered the station, and each picked up one of the tote bags. Thompson positioned himself at the loading platform, and Facchiano stood near the conductor's podium where he saw VILATO hand the conductor both his and Lamar's tickets. When the subjects walked out to the loading ramp, at approximately 8:45, Thompson and Facchiano identified themselves as narcotics investigators and produced their law enforcement badges. Thompson asked the two whether they objected to speaking with him for a moment, but he told them that they did not have to and that "[i]t is up to you." VILATO responded, "it's okay."

Thompson requested VILATO to produce his train tickets and identification and pointedly inquired as to where he lived and where he was traveling. VILATO responded to this question-

ing that he was going to Philadelphia and that he lived in Miami. Thompson noticed that VILATO's driver's license was in the name of "Javier Mario Vilato" but the tickets were in the names of "J. Lopez" and "T. Martinez." Both were one-way and had been purchased with cash. When Thompson told VILATO to explain the discrepancy between the names on the tickets and the name on his license, VILATO told him that he had made reservations over the telephone and when he had given his reservation confirmation number at the ticket counter he received those tickets from the clerk. VILATO said that he had not bothered to look at the names on the tickets. Thompson returned the license and tickets to VILATO, and told the two that he and Facchiano were narcotics investigators. He explained that there was a problem with narcotics leaving

Miami and going to other major cities. Thompson testified that, upon hearing this, VILATO's "body began to shake and there was a lot of perspiration around his forehead."

Thompson then asked VILATO whether he had any objection to the detectives' searching his luggage, and VILATO said that he did not. Thompson then told VILATO that he had the right to refuse consent for the search. Facchiano then searched Lamar's bag, but before he could search VILATO's luggage, VILATO, now aware of his right to refuse, withdrew his consent and stated that the police could not search the bag. Thompson informed VILATO that they would have to honor his request but that VILATO would have to submit his bag to a sniff search by a drug sniffing dog. Facchiano then left to call for the dog.

When Facchiano departed,

Thompson informed VILATO that he had a constitutional right not to make any statements and that if the dog reacted positively, VILATO would be arrested and would have the right to call an attorney. Thompson did not advise VILATO of all his Miranda rights. Thompson intended to detain VILATO until the dog arrived. VILATO then asked Thompson what he and Facchiano were looking for, and Thompson responded that they were searching for large amounts of narcotics. VILATO said that he did not have "anything like that." Thompson asked why he had withdrawn consent to search the bag. VILATO told him that he had a gun in his luggage. Thompson asked whether it was legal, and VILATO replied that he had the papers for it at home. Thompson asked to see the gun; VILATO told him that he could.

By this time, Facchiano had

returned from making the call for the dog. When the detectives began to examine the bag, VILATO suggested that they move to a more private place "because I don't want anybody to see it and get excited." The officers took the bag and VILATO into a less crowded area of the station lobby and searched the bag. They found a bullet-proof vest and a .22 caliber automatic pistol with a silencer. The detectives then arrested VILATO and read him his Miranda warnings.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, WHICH AFFIRMED THE LAW ENFORCEMENT STOP AND SEIZURE OF PETITIONER AS HE WAS BOARDING A DEPARTING TRAIN, IS CONTRARY TO JUDICIAL PRECEDENT AND IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE RULE OF LAW ANNOUNCED IN UNITED STATES v. PLACE, 462 U.S. _____, 103 S.CT. 2637 (1983); FLORIDA v. ROYER, 460 U.S. _____, 103 S.CT. 1319 (1983); AND UNITED STATES v.

MENDENHALL, 446 U.S. 544, 100 S.CT. 1870 (1980).

The decision of the Eleventh Circuit Court of Appeals cannot be reconciled with the decisions of this Court in United States v. Place, 462 U.S. _____, 103 S.Ct. 2637 (1983); Florida v. Royer, 460 U.S. _____, 103 S.Ct. 1319 (1983); and United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980). Herein, the Eleventh Circuit has rejected the mandate of prevailing judicial precedent in favor of an artificial rule of law which elevates the intentions and assumptions of investigating officers to the definition of the reasonable man standard. Under the guise of Royer, the Eleventh Circuit has embarked upon a course of wholesale abdication to the conduct of law enforcement officers.

The Fourth Amendment is

designed to safeguard individuals from unreasonable government invasions of legitimate privacy interests. Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735, 1746 (1984); United States v. Chadwick, 433 U.S. 1, 7, 11, 97 S.Ct. 2476, 2481, 2483 (1977). That Amendment does not, of course, proscribe all contact between police and citizens, but is meant "to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals." I.N.S. v. Delgado, ____ U.S. ____, 104 S.Ct. 1758, 1762 (1984), citing United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081 (1976). This protection against unreasonable seizures extends to "seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574,

2578 (1975). The standard applicable to discerning whether an initially consensual encounter between a person and a police officer becomes a seizure or detention within the meaning of the Fourth Amendment is whether a reasonable person would have believed that he was free to leave. I.N.S. v. Delagado, supra at 1762.

In the present case, the Eleventh Circuit ruled that the initial detention of Petitioner as he boarded a departing train was not a seizure for Fourth Amendment purposes, primarily because "a reasonable person would have believed himself free to leave." While the use of that legal standard is correct, Mendenhall, supra, 446 U.S. at 554, 100 S.Ct. at 1877, its application to the particular circumstances of a police-citizen confrontation at a train station and the result reached by the

Court constitute a serious departure from principles of common sense, logic and judicial precedent. It is plain beyond cavil that the manner in which the narcotics officers approached JAVIER VILATO and conducted their questioning demonstrated a show of authority sufficient to overbear the will of any reasonable person. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the officers' questions. The appellate court's efforts to avoid this conclusion depend more on subjective desires than on the clearly announced law governing this area.

There is no doubt that within the existing legal framework, a factor which must be considered by a court in determining the existence of a detention/seizure is whether the suspect was advised that he could go. United

States v. Waksal, 709 F.2d 653, 661 (11th Cir. 1983)(a factor weighing heavily in favor of finding that seizure occurred is the failure of the police to notify the accused of his freedom to leave). The rule utilized by the Eleventh Circuit in resolving the VILATO case completely avoids this very important factor. VILATO was attempting to leave, by boarding the train, when the detectives accosted him. Although the officers stated that VILATO did not have to talk with them, the officers never advised VILATO that he was free to leave. This is quite a substantial difference, such that the appellate court's lack of attention to this circumstance results in the announcement of a totally imprecise rule by which the legality of an encounter/detention is to be measured.

This Court's resolution of similar cases was totally ignored by the Eleventh Circuit, causing uncertainty with respect to judicial precedent in this very important area. A detention of any length which is not purely voluntary on the part of the suspect, prompted by the suspect's knowledge of his legal rights, is one which the Fourth Amendment condemns unless supported by reasonable suspicion. See Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979). Where circumstances of an encounter are so "intimidating as to demonstrate that a reasonable person would have believed he was not free to leave," that person has been detained. I.N.S. v. Delgado, 104 S.Ct. at 1763 (1984). Here, because the Eleventh Circuit chose to ignore those recognized legal principles, this Court must resolve the resulting jurisprudential

controversy which inevitably will grow due to the inability of courts to resolve the conflicting approaches.

The lower tribunal, in addition to restating the law relating to unlawful detentions, has also divorced itself from a solid judicial front with respect to a determination of voluntariness for consensual searches. While the court's consent ruling revolves around the fact that VILATO knew that he could refuse permission to search and initially exercised that refusal, the Court completely ignores the admitted fact that the investigating detectives advised VILATO that although he could refuse consent, they would simply detain him until a narcotics sniffing dog was brought to the scene. For all practical purposes, VILATO had absolutely no choice. If he did not consent, the police would utilize an olfactory search

by a dog, whether or not he approved.

Limiting a suspect's choices by warning that certain law enforcement action will take place serves to deprive the suspect of any real choice, knowing that law enforcement officers are going to achieve their desired end notwithstanding the suspect's position. A threat or promise to detain VILATO until a narcotics dog arrived to sniff the luggage is as much an attempt at coercion as advising a suspect that refusing to consent will cause the issuance of a warrant. See United States v. Faruolo, 506 F.2d 490 (2d Cir. 1974) (Newman, concurring). Indeed, the very clear implication of the officer's warning to VILATO was that he would be detained pending arrival of the narcotics dog. United States v. Ocheltree, 622 F.2d 992 (9th Cir. 1980)(advice by agent that warrant would be obtained if

suspect refused to consent, during which time suspect would be detained, rendered consent involuntary).

The Eleventh Circuit disregarded these generally accepted legal principles in resolving this case. In so doing, the Court did not even consider the impact which the law enforcement statements had on VILATO'S ability to freely consent. Rather, the Court proceeded to directly examine the circumstances of the detention during the dog sniff. By disregarding the events which led to the actual detention, the Eleventh Circuit departed from this Court's careful analysis in United States v. Place, supra, which recognized that a considerable difference exists between a detention of person and property. While a limited seizure of property might be constitutionally permissible upon a showing of adequate

cause, a seizure of the person intrudes far more on the interests protected by the Fourth Amendment.

The net result of the Eleventh Circuit decision is that the Court has confused existing legal precedent which, by the improper application thereof, results in a reshaping of search and seizure principles. This Court has been careful to resolve Fourth Amendment issues with an interest in providing clear guidelines to law enforcement, defendants, and the public. See Segura v. United States, ____ U.S. ____, 104 S.Ct. 3380 (1984); United States v. Leon, ____ U.S. ____, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard, U.S. ___, 104 S.Ct. 3424 (1984). Rather than promoting stability and certainty, the decision below fosters confusion and ambiguity. It represents a dangerous erosion of the principles guaranteed by

the Fourth Amendment. This Court should take this opportunity to delineate the distinctions between seizures and detentions, coerced and voluntary consent, and seizures of the person and property.

CONCLUSION

For the previously stated reasons, this Court should issue its writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5622
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

JAVIER M. VILATO,

Defendant/Appellant.

Appeal from the
United States District Court
for the
Southern District of Florida

(May 22, 1984)

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

The defendant-appellant, Javier M. Vilato, was convicted of one count of possession of a firearm not identified by a serial number, 26 U.S.C.A. §§5861(i) and 5871, and one count of possession of an

unregistered firearm, 26 U.S.C.A. §§ 5861(d) and 5871. Vilato appeals the district court's denial of his motion to suppress a handgun and silencer seized from his luggage at the Miami Amtrak station.

Testimony at the suppression hearing indicated that at 7:40 a.m. on November 17, 1982, Dade County Detectives John Facchiano and Charles Thompson, both experienced narcotics officers, arrived at the Miami Amtrak station with the express purpose of identifying narcotics carriers, who the officers knew often transported drugs through the station. Upon arriving at the station, the officers noticed the appellant and a companion, identified later as "Lamar", standing outside the station talking to one another. The pair attracted the detectives' attention because they were looking around and over each other's shoulders. The subjects appeared to be paying particular attention to two unattended tote

bags that sat on chairs in the station's waiting area. The detectives watched the appellant and Lamar as they entered and exited the station several times, always remaining in a position to see the two tote bags. Facchiano testified that the subjects appeared "ill at ease" and that they were not behaving like normal travelers. When the boarding announcement was made for the "Silver Meteor", a Miami to Philadelphia train scheduled to depart at 9:04, Vilato and Lamar entered the station, and each picked up one of the tote bags. Thompson positioned himself at the loading platform, and Facchiano stood near the conductor's podium where he saw Vilato hand the conductor both his and Lamar's tickets. When the subjects walked out to the loading ramp, at approximately 8:45, Thompson and Facchiano identified themselves and produced their badges. Thompson asked the two whether they objected to

speaking with him, but he told them that they did not have to and that "[i]t is up to you." Vilato responded, "it's okay." Thompson asked Vilato to produce his train tickets and identification and inquired as to where he lived and where he was travelling. Vilato replied that he was going to Philadelphia and that he lived in Miami. Thompson noticed that Vilato's driver's license was in the name of "Javier Mario Vilato" but the tickets were in the names of "J. Lopez" and "T. Martinez." Both were one-way and had been purchased with cash. When Thompson asked Vilato to explain the discrepancy between the names on the tickets and the name on his license, Vilato told him that he had made reservations and when he had given his reservation number at the ticket counter he received those tickets. Thompson returned the license and tickets to Vilato, and told the two that he and Facchiano were narcotics investiga-

tors. He explained that there was a problem with narcotics leaving Miami and going to other major cities. Thompson testified that upon hearing this Vilato's "body began to shake and there was a lot of perspiration around his forehead."

Thompson then asked Vilato whether he had any objection to the detectives' searching his luggage, and Vilato said that he did not. Thompson testified that he told Vilato that he had the right to refuse consent for the search. Facchiano then searched Lamar's bag, but before he could search Vilato's tote, the appellant told the detectives that he would prefer they not search it. Thompson said that they would honor his request but that he would have to call a narcotics sniffing dog to sniff Vilato's bag. Facchiano then left to call for the dog.

After Facchiano left, Thompson informed Vilato that he had a constitu-

tional right not to make any statements and that if the dog reacted postively Vilato would be arrested and would have the right to call an attorney. Vilato then asked Thompson what he and Facchiano were looking for, and Thompson responded that they were searching for large amounts of narcotics. Vilato said that he did not have "anything like that." Thompson asked why he had withdrawn consent to search the bag. Vilato told him that he had a gun in his luggage. Thompson asked whether it was legal, and Vilato replied that he had the papers for it at home. Thompson asked to see the gun; Vilato told him that he could. By this time Facchiano had returned from making the call for the dog. When the detectives began to examine the bag Vilato suggested that they move to a more private place "because I don't want anybody to see it and get excited." The officers took the bag and Vilato into a less crowded area of

the station lobby and searched the bag. They found a bullet-proof vest and a .22 caliber automatic pistol with a silencer. The detectives then arrested Vilato and read him his Miranda warnings.

Vilato first contends that the officers' initial confrontation of him and Lamar was unlawful because Thompson and Facchiano had no "reasonable articulable suspicion" to lead them to conclude that Vilato was engaged in criminal activity.

> Supreme Court holdings sculpt out, a least theoretically, three tiers of police-citizen encounters: communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, brief "seizures" that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause.

United States v. Berry, 670 F.2d 583, 591 (5th Cir. Unit B 1982)(en banc). Where police stop individuals for limited purposes in a completely non-coercive manner, the Fourth Amendment is not invoked. Id. at 594. A seizure of the type that requires the police to have a reasonable suspicion of criminal activity, see Terry v. Ohio, 392 U.S. 1 (1968), occurs when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Florida v. Royer, _____ U.S. _____, 103 S.Ct. 1319 (1983); Berry, 670 F.2d at 595.

The testimony adduced at the suppression hearing clearly indicates that under this standard the officers' initial confrontation with Vilato did not rise to the level of a Terry-type seizure. The officers asked to speak

with Vilato and told him that he did not have to talk to them if he did not want to. Vilato admitted that he was told he need not talk. The officers testified that they did not show their weapons or behave in a physically threatening manner. Given these facts, a reasonable person would have believed himself free to leave. Whether the officers had a reasonable suspicion at this point is, therefore, immaterial.

Vilato next urges that when the detectives detained him and his luggage awaiting the drug detecting dog, this constituted a full-scale arrest, for which probable cause is required. This Court has recently faced the question of when police seizures of a traveler or his luggage become a full arrest requiring probable cause. In United States v. Puglisi, No. 82-8592, slip op. at 1304-12 (11th Cir.

January 23, 1984), we held that seizure of the defendant's luggage for over 140 minutes constituted an impairment of his possessory interest in the baggage rising to the level of a full arrest. We placed heavy reliance on United States v. Place, ____ U.S. ____, 103 S.Ct. 2637 (1983), where the Supreme Court held that a 90-minute seizure of a traveler's luggage required probable cause and not a mere reasonable suspicion. In Puglisi, we listed several factors relevant to determining whether "the seizure was of such a duration and so restricted the possessor's freedom of movement that, given the circumstances, the seizure may only be supported by probable cause." Slip op. at 1305.

> Place establishes that the amount of time the owner is actually or constructively detained is a good yardstick for

> assessing the reasonableness of a reasonable suspicion seizure. A court should also look to the severity of the disruption in the suspect's travel plans, whether the luggage was seized from the suspect in a manner likely to cause him great embarrassment, and, as in Place, whether the length of the seizure was unnecessarily extended by lack of police diligence.

Id. at 1309. Concluding that "[t]he impairment of an air traveler's reasonable possessory interest in his luggage is especially intrusive when the seizure causes him to depart without his luggage or miss his flight," id. at 1311, the Court held that, because the seizure of Puglisi's baggage required him to depart without it, the seizure constituted an arrest, which could be supported only by probable cause.

In the present case, although the detention of Vilato and his effects might have risen to the level of a full-scale arrest had it continued, at the time Vilato finally consented to the search only a reasonable suspicion was required to support the seizure. The detectives' testimony indicates that the entire confrontation, from the time the detectives first approached Vilato and Lamar to the time that Vilato consented to a search of his bag, took only ten minutes. During this span, Vilato was merely waiting on the platform for the Silver Meteor to leave. It was not scheduled to depart until 9:04, and the detectives first confronted the suspects at about 8:45. Consequently, the detention did not force Vilato to miss the train or to leave without his luggage. Vilato himself testified that he was willing to speak to the officers because

he "didn't think the train was going to leave right away." It is true that the seizure might, if it had continued longer, have ripened into a full-scale arrest for which probable cause would have been required. This point probably would have been reached had the detectives detained Vilato so long that he would have had to miss his train or if they had kept his bag requiring him to leave without it. But this point was not reached because before the train left Vilato consented to the search. Once the officers searched Vilato's bag they had probable cause to arrest him.

Having characterized the seizure as one of the Terry variety, we must decide whether the detectives had a reasonable suspicion that Vilato was engaged in illegal activity. A number of circumstances could have raised suspicion in a reasonable mind that

Vilato was carrying drugs. Vilato and Lamar were observed to be behaving strangely before the boarding call for the Silver Meteor -- they were paying particular attention to the two unattended tote bags that they later picked up before attempting to board the train. The pair carried tickets that were not their real names. Vilato told Thompson that he was on a trip to Philadelphia to visit friends, but his ticket was one-way and paid for in cash and his luggage did not appear sufficient for someone going that far. Vilato appeared nervous, and when Thompson mentioned narcotics he began to shake and perspire heavily. From long experience the officers knew that the Amtrak station was a commonly used departure point for drug couriers carrying narcotics to northern cities.

Finally, as the testimony of the officers makes clear, Vilato freely consented to the search of his bag. Vilato understood that he had the right to deny consent to search. The officers told him they would not search without his permission, and when Vilato initially withdrew consent to search, the detectives honored his request. Vilato initiated the conversation that led to his consent. He told Thompson that he could see the gun, which he admitted was in his bag. Vilato cooperated with the search, and even suggested that the officers open the bag in a less crowded area of the station to prevent any other travelers from becoming excited.

In conclusion, the detectives did not violate the appellant's Fourth Amendment rights by confronting him on the loading platform, by detaining him prior to his consent to search, or by

searching his luggage. Consequently, the appellant's conviction is AFFIRMED.

EXCERPT FROM TRANSCRIPT AT TRIAL
ORAL ORDER DENYING MOTION TO SUPPRESS
TRANSCRIPT PAGES 147-149

THE COURT: Under the circumstances revealed by the testimony in this case, the Court concludes that the defendant, Javier Vilato, gave consent to officers Thompson and Facchiano to search the bag that he was carrying on November 17, 1982 at the Amtrak station in Miami, Florida.

Further, the Court finds that the experienced officers who approached the defendant, Javier M. Vilato, on November 17, 1982, with the request ultimately to search his bag, had probable cause for the events as they have been described by the officers to go forward and to search the bag.

The factors that led to this conclusion are as follows:

One. The defendant was located at a station known to the officers to be heavily frequented by persons violating the law; that is, the Amtrak station, catching the train out of Miami, Florida to northern cities.

Two. The ticket that he had purchased was in an assumed name and had been paid for with cash.

Three. The ticket was a one-way ticket, although the defendant stated that he lived in Miami and was going to Philadelphia for a short vacation.

Four. The luggage did not appear to be sufficiently large to contain what one would normally take on such a visit.

Five. The nervous appearance of the defendant to the experienced officers who observed him sweating profusely when they announced they were

police officers and wished to examine his luggage.

Six. The muscle constriction and obvious nervousness of the defendant and his companion both before and after the officers approached him to discuss these matters with him.

Under these circumstances, the Court finds that not only did the defendant give his consent freely and voluntarily, but also that the officers had probable cause to take the actions that they took. The motion to suppress is therefore denied.